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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

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9 Greyhound Lines Incorporated,
10 Plaintiff,
11 v.
12 Viad Corporation,
13 Defendant.
14

No. CV-15-01820-PHX-DGC

AMENDED ORDER

15
16 Plaintiff Greyhound Lines Incorporated (“Greyhound”) moves to exclude all or
17 parts of the expert testimony of Thomas J. Schruben, an expert witness for Defendant
18 Viad Corporation (“Viad”). Doc. 85. The Court has reviewed the parties’ briefing and
19 concludes that oral argument will not aid the Court’s decision. The request for oral
20 argument is therefore denied. Fed. R. Civ. P. 78(b). The Court will address each of
21 Greyhound’s arguments.

22 **1. Undisclosed Documents.**

23 Greyhound argues that Schruben failed to disclose all of the documents he
24 “considered” in developing his expert opinions as required by Rule 26(a)(2)(B)(ii).
25 Specifically, one entry in Schruben’s expert report noted that he “had access to”
26 documents produced in this litigation, but failed to state which documents and whether he
27 had considered or relied on them. Greyhound complains that it devoted significant time
28 trying to identify these documents in Schruben’s deposition, without success, and that its

1 inability to identify these documents will hamper its ability to cross-examine Schruben at
2 trial. Viad responds that Schruben's 57-page report cites more than 700 specific
3 documents he relied on in forming his opinions.

4 The Court will not exclude Schruben's testimony on this basis. Schruben will not
5 be permitted to rely on any document during his trial testimony that he did not identify in
6 his report or in response to deposition questions. As his testimony will likely be only as
7 reliable as the evidence upon which it is based, this limitation adequately protects
8 Greyhound against unfair prejudice or surprise at trial and prevents Schruben from
9 attempting to bolster the credibility of his opinions by citing documents he did not
10 disclose.

11 **2. Failure to Disclose ACRM.**

12 Greyhound states that Schruben's report simply identified his work for the last ten
13 years as an "environmental consultant," and failed to disclose that most of his work was
14 performed for ACRM, a company that assists underground storage tank fund managers.
15 Greyhound argues that it was required to spend an inordinate amount of time pursuing
16 this information in Schruben's deposition and could have prepared for a more effective
17 deposition if the information had been disclosed in his report. Viad responds that
18 Schruben's report and resume did disclose that he consults for state fund managers, and
19 notes that Greyhound never expressed concern – to Viad or the Court – about the amount
20 of time it had to depose Schruben.

21 The Court will not exclude Schruben's testimony on this basis. The information
22 was disclosed during Schruben's deposition, is now known to Greyhound, and can be
23 used in preparing for Schruben's testimony at trial. Indeed, Greyhound's argument on
24 this point appears to be something of a rehearsal for that cross-examination.

25 **3. Schruben's Alleged Legal Opinions.**

26 Greyhound cites the following heading from Schruben's opinion: "Environmental
27 Obligations Arising From UST Leaks Of Which Viad Was Notified Before March 2,
28 1992." Doc. 96 at 7. From his heading alone, Greyhound concludes that Schruben is

1 offering improper legal opinions on the meaning of “Notice” and “Environmental
 2 Obligations” in this case. Doc. 85 at 11-12. Viad makes clear in its response, however,
 3 that Schruben offers no opinions on the legal interpretation of these terms. Doc. 93 at 11.
 4 Viad agrees that the Court will resolve the meaning of these terms. *Id.* at 10. No further
 5 ruling is required.

6 **4. Line Leak Detector at the Jacksonville Property.**

7 The parties disagree on the nature of Schruben’s opinion. Greyhound claims that
 8 it is based on the fact that a line leak detector was removed at the Jacksonville property,
 9 when in fact none was ever in place. Viad argues that Schruben’s opinion is based on the
 10 absence of a detector, whether removed or absent from the outset, as well as other facts,
 11 such as failure of a tightness test.

12 This factual disagreement does not require exclusion of any Schruben opinion in
 13 this bench trial. The Court will be able to resolve this issue on the evidence presented at
 14 trial, and to assess the credibility of Schruben’s testimony based on Greyhound’s claim of
 15 a factual error. *See KnightBrook Ins. Co. v. Payless Car Rental Sys., Inc.*, 43 F. Supp. 3d
 16 965, 985 (D. Ariz. 2014).

17 **5. Alleged Defects in Opinions.**

18 Greyhound notes that Schruben failed to explain the presence of some
 19 contamination at the Seattle property, failed to consider possible sources of gasoline
 20 contamination at the Portland property, and failed to consider alternative sources of
 21 contamination at the Miami property. Viad responds that Schruben’s opinions are limited
 22 to whether the contamination for which Greyhound seeks cleanup costs relates to tank
 23 leaks of which Viad had notice before March 1, 1992 – Schruben’s purpose is not to
 24 pinpoint the source of all contamination.

25 The Court will not exclude Schruben’s testimony on this basis. The parties again
 26 have differing views about the import of his testimony, and Greyhound will be fully
 27 capable of presenting its view and exposing weaknesses in Schruben’s testimony at trial.
 28 As the Supreme Court has noted, “[v]igorous cross-examination, presentation of contrary

1 evidence, and careful [attention to] the burden of proof are the traditional and appropriate
2 means of attacking shaky but admissible evidence." *Daubert v. Merrell Dow Pharm.,*
3 *Inc.*, 509 U.S. 579, 596 (1993). This is particularly true in light of the fact that this will
4 be a bench trial. *See KnightBrook*, 43 F. Supp. 3d at 985.

5 **IT IS ORDERED** that Greyhound's motion to exclude (Doc. 85) is **denied**.

6 Dated this 7th day of November, 2016.

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12 David G. Campbell
13 United States District Judge
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